Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of **AMENDMENT OF THE COMMISSION'S RULES RELATED TO RETRANSMISSION CONSENT**	MB Docket No. 10-71

COMMENTS OF DIRECTV, LLC AND DISH NETWORK L.L.C ON SYNDICATED EXCLUSIVITY AND NETWORK NON-DUPLICATION

In its recent *Retransmission Consent Order*, the Commission sought "comment on the extent to which the network non-duplication and syndicated exclusivity rules are still needed to serve their intended purposes in light of changes in the video marketplace and the legal landscape in the decades since their adoption," and on "how elimination of the exclusivity rules would impact affected parties."[1] These two "exclusivity rules" permit a station possessing exclusive rights to broadcast network programming or syndicated programming within its local service area to enforce such exclusivity through Commission processes, as opposed to through contractual provisions.

DIRECTV, LLC ("DIRECTV") and DISH Network L.L.C. ("DISH") support any action the Commission could take to address the unfair leverage that broadcasters enjoy in retransmission consent negotiations. The Commission, however, should also consider how to implement any such reforms in a competitively neutral manner. If the Commission were to eliminate the exclusivity rules, for example, it could unfairly disadvantage satellite TV providers

[1] *Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd. 3351, ¶ 58 (2014) ("*Retransmission Consent Order*").

unless other reforms are adopted, because the network non-duplication and syndicated exclusivity rules apply differently today to cable and satellite. DISH and DIRECTV suggest additional reforms that, if adopted in conjunction with elimination of the exclusivity rules, would help consumers have access to blackout-free local broadcast stations from the pay-TV provider of their choice.

I. IF THE COMMISSION ELIMINATES THE EXCLUSIVITY RULES, IT MUST ALSO TAKE PARALLEL ACTION TO ENSURE COMPETITIVELY NEUTRAL REFORM

DIRECTV and DISH believe that eliminating the exclusivity rules would be a positive step toward a better-functioning market, as it would remove two of the regulatory barriers that allow one broadcast station to prevent other stations from competing for multichannel video programming distributor ("MVPD") carriage in a given market. This, in turn, would, among other things, strengthen incentives for broadcasters to focus on localism as a way to differentiate themselves from out-of-market stations. Accordingly, DIRECTV and DISH support the Commission's proposal to eliminate the exclusivity rules.

Without other changes, however, eliminating the exclusivity rules alone could actually prove counterproductive. The Commission would need to take additional action to achieve its remedial goal in a competitively neutral manner, either by requiring stations to grant waivers in certain circumstances or granting other relief related to the provision of distant signals via satellite.

As the Commission noted, the exclusivity rules apply largely to cable operators.[2] By contrast, they apply to satellite carriers only with respect to the carriage of six nationally

[2] *Id.* ¶¶ 43-44; 48-50.

distributed superstations and to formerly significantly viewed stations.[3] In the satellite context, territorial exclusivity is enforced through a different mechanism. By statute, broadcast signals from a network station outside the local market may only be provided to viewers (1) to whom the satellite carrier does not make available the local affiliate for the same network[4]; and (2) who reside in so-called "unserved households" where an over-the-air signal of sufficient intensity is not predicted to be available from a local station of the same network.[5] Thus, for example, if there is an ABC-affiliated station in Market X, then a satellite carrier is not allowed to import the signal of an ABC-affiliated station in adjacent Market Y (1) to any viewer in Market X if it carries the Market X ABC affiliate; or (2) to viewers in Market X who are predicted to be served over-the-air by the Market X ABC affiliate. Unlike the exclusivity rules, the "no distant where local" and "unserved household" restrictions prohibit importation of distant signals even where the local affiliate has not obtained or cannot assert exclusive contractual rights to particular programming.

Eliminating the exclusivity rules for cable operators, as the *Retransmission Consent Order* proposes, would not affect this satellite-specific prohibition, and therefore would not afford satellite carriers any meaningful relief from the exclusivity advantages now enjoyed by broadcasters. If those rules were eliminated, cable operators alone would be allowed to import competing network-affiliated broadcast signals from adjacent markets, and as a result would alone possess more equal bargaining leverage when negotiating with broadcasters. Satellite operators, by contrast, would still labor under existing exclusivity restrictions and would remain

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[3] *Id.* ¶¶ 45; 51. They also apply to stations that are removed from the "significantly viewed" list. 47 C.F.R. § 76.122(j); *id.* § 76.123(k).

[4] 17 U.S.C. § 119(a)(3)(C); 47 U.S.C. § 339(a)(2)(C).

[5] *See* 17 U.S.C. § 119(a)(2).

vulnerable to broadcasters' exercise of market power. Because the "unserved households" requirement is imposed by statute, moreover, it is not amenable to modification by the Commission. Therefore, eliminating the exclusivity rules should be pursued *only* if accompanied by parallel actions to ensure the reforms have their intended effect for all MVPDs.

If the Commission eliminates the exclusivity rules, it should implement reforms to place satellite on equal footing with cable. The most parallel reform would be to establish that it is a *per se* violation of the good faith negotiation requirement for a broadcaster to withhold retransmission consent from a satellite carrier without granting that carrier a temporary waiver permitting the importation of same-network distant signals throughout the DMA until a carriage agreement has been reached.[6] Such a policy would effectively achieve for satellite carriers the same relief that elimination of the exclusivity rules would achieve for cable operators, putting all MVPDs on equal footing and allowing them to provide uninterrupted network service to their subscribers.

Requiring stations to grant such waivers would not lead to the wholesale replacement of local signals. If, as broadcasters claim, the local content they provide is valuable to viewers within their respective DMAs, satellite carriers will have a strong incentive to reach a carriage agreement with the local station, at which point (1) the waiver would terminate and (2) the "no distant where local" rule would prohibit importation of the distant signal. However, if the local station is not providing programming of interest to its community, or if it is demanding an above-market price for the right to retransmit its signal, a government-imposed and antiquated system of territorial rights would no longer deprive viewers of network programming.

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[6] Under STELA, households covered by such a waiver would be deemed to be "unserved," and therefore eligible to receive distant signals. *See* 17 U.S.C. § 119(d)(10)(B).

II. THE COMMISSION SHOULD CONSIDER OTHER REFORMS TO LEVEL THE PLAYING FIELD AMONG BROADCASTERS, CABLE OPERATORS, AND SATELLITE CARRIERS

The Commission should also consider other changes to its rules to restore some semblance of balance to the retransmission consent negotiation process.

A. The Commission Should Revise the Predictive Model to More Accurately Reflect "Unserved Households"

The Commission should begin to address systemic problems that have plagued the predictive model used to determine whether households are "unserved." Again, where a satellite carrier does not offer the local affiliate, it may deliver distant signals only to "unserved households" as determined by use of the Commission's predictive model. Accordingly, as the Commission once told Congress, "[a]ny predictive model that is prescribed should provide output that is as accurate as possible."[7] This is why Congress directed the Commission to promulgate a model that "reliably" determines eligibility.[8] A "reliable" model is one that predicts subscribers to be served when they are in fact served and to be unserved when they are in fact unserved.

The Commission, however, has long acknowledged that its predictive model is not always accurate or reliable.[9] Indeed, it once stated that "predictive models are inherently

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[7] *Study of Digital Television Field Strength Standards and Testing Procedures*, Report to Congress on the Satellite Home Viewer Extension And Reauthorization Act of 2004, 20 FCC Rcd. 19504, ¶ 148 (2005).

[8] 47 U.S.C. § 339(c)(3)(A).

[9] *See Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, 14 FCC Rcd. 2654, 2689 (1999) ("If a household is unserved in reality, the ILLR prediction model will not change that situation…. A predictive model of any sort simply reflects reality without actually testing or observing it, and some are better than others at painting the most lifelike picture.").

imperfect because they seek to replicate reality without actually measuring or observing it."[10] DIRECTV and DISH have extensive experience with this model, and can state with certainty that it tends to under-predict distant signal eligibility. That is, it predicts many subscribers to be *ineligible* for distant signals when, in reality, they cannot actually receive viewable local signals.

DIRECTV recently asked the Commission to employ its new *TVStudy* software to update the "unserved household" predictive model.[11] DIRECTV and DISH renew that call here, and believe that this should constitute the first step towards a re-evaluation of its predictive model.

B. The Commission Should Expand the Factors That Give Rise to a Good Faith Complaint

The Commission should also clarify and expand the "good faith" rules to curtail broadcaster abuse of the retransmission consent process. Congress instructed the Commission to adopt and enforce rules that "prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith."[12] Such rules are supposed to provide that a broadcaster violates its good faith duty when its demands include terms or conditions not based on competitive marketplace considerations.[13] However, broadcasters have increasingly engaged in anti-competitive brinkmanship tactics that undermine the Commission's good faith requirements. Thus, DIRECTV and DISH propose that, at a minimum, the Commission clarify and expand the good faith rules to prohibit the following:

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[10] *Id.*, ¶ 72.

[11] *See* Letter from William M. Wiltshire and Michael Nilsson to Marlene Dortch, ET Docket No. 10-152 (Apr. 14, 2014).

[12] 47 U.S.C. § 325(b)(3)(C)(ii).

[13] *Id*.

- Giving a network the right to negotiate or approve a station's retransmission consent agreements or any major term in such agreement.
- Demanding that an MVPD not carry legally available out-of-market stations (*e.g.*, distant signals or significantly viewed signals), or substantially burdening such carriage, as a condition of retransmission consent.
- De-authorizing carriage immediately prior to or during marquee events, such as the Super Bowl, World Series, or Academy Awards.
- Refusing to make a *bona fide* offer of retransmission consent except on terms that require the MVPD to carry other, non-broadcast programming where:
    - Any difference between the standalone price for the broadcast channel and the price for the broadcast channel as part of the bundle is not justified by actual and reasonable differences in the cost of the sale, delivery, or transmission of the programming at issue, or
    - The standalone price of the broadcast channel is not reasonable when compared to the standalone prices for other similar broadcast channels in the same local market.
- Imposing a blackout in any DMA where the broadcaster has failed to provide an adequate over-the-air signal to a materially large number of subscribers.
- Restricting access, under an unexpired retransmission consent agreement or within six months after the expiration of a retransmission consent agreement, to freely available online video programming to any broadband subscriber of an Internet service provider that is affiliated with the pay-TV provider.

C. The Commission Should Impose a Mandatory Standstill and Baseball-Style Arbitration During a Retransmission Consent Dispute

The Commission should also take steps, consistent with its authority under the Communications Act,[14] to ensure that consumers are not harmed in the event that retransmission consent negotiations between broadcasters and pay-TV providers break down. Specifically, during a retransmission consent impasse between a broadcaster and satellite provider, the Commission should impose a mandatory "standstill" to ensure that the broadcast signal stays up. This standstill should apply during a Commission-imposed "cooling off" period between the parties, during which the Commission invites the parties to a meeting to discuss the impasse. If, after the cooling off period, the parties are still unable to agree upon carriage terms, they should proceed to so-called "baseball" arbitration, where a neutral arbitrator chosen by the parties evaluates each party's best offer and selects the one that most accurately reflects a fair market price. In all cases, the final agreed-upon rate would apply retroactively, ensuring that the broadcaster is fairly compensated. Most important: the consumer would remain unharmed.

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DIRECTV and DISH support elimination of the network non-duplication and syndicated exclusivity rules *along with* parallel action to ensure that an otherwise straightforward deregulatory action does not inadvertently create a competitive imbalance between the cable and satellite industries.

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[14] *See* Letter from John Bergmayer *et al*. to Marlene Dortch, MB Docket No. 10-71 (filed Dec. 11, 2013) (outlining the Commission's existing authority to implement retransmission consent reform generally, and to impose a standstill specifically).

Respectfully submitted,

/s/

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